SUPREME COURT OF THE UNITED STATES.

No. 603.—October Term, 1927.

L. P. Larson, Jr. Company, Petitioner, vs. Wm. Wrigley, Jr. Company. } On Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

[May 14, 1928.]

Mr. Justice Holmes delivered the opinion of the Court.

There has been long litigation between the parties in this suit, the last stage of which appears in 20 F. (2d) 830. The Wrigley Company was ordered to account for net profits on sales of its 'Doublemint' gum in a package dress that infringed the Larson Company's 'Wintermint' gum package. During the accounting questions arose that were decided by the Circuit Court of Appeals. To review one of these questions a writ of certiorari was granted by this Court. That question is whether, as held below with modifications that need not be mentioned, the Wrigley Company should be allowed to deduct the federal income and excess profits taxes from the profits with which it is to be charged.

No doubt there are cases in which such a deduction would be proper. But the question cannot be answered by the merely formal reply that if the Larson Company chooses to make the Wrigley Company its agent or trustee *ex maleficio* and to demand the profits made by the agent it must take the burden with the benefit and can have no more than the agent made in fact. To call the infringer an agent or trustee is not to state a fact but merely to indicate a mode of approach and an imperfect analogy by which the wrongdoer will be made to hand over the proceeds of his wrong. Circumstances will affect the conclusion, including in them the knowledge and the conduct of the party charged. It would be unjust to charge an infringer with the gross amount of his sales without allowing him for the materials and labor that were necessary to produce the things sold, but it does not follow that he should be al-

lowed what he paid for the chance to do what he knew that he had no right to do. That is the position of the Wrigley Company as we understand the findings in the successive stages of this suit. 253 Fed. Rep. 914, 916. 275 Fed. Rep. 535, 537, 538. 5 F. (2d) 731, 739. 20 F. (2d) 830, 831. Even if the only relief that the Wrigley Company can get is a deduction from gross income when the amount of its liability is finally determined, the Larson Company will have to pay a tax on the Wrigley profits when it receives them, and in a case of what has been found to have been one of conscious and deliberate wrongdoing, we think it just that the further deduction should not be allowed.

Decree as to allowance of federal taxes reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.